

# MONTANA ADMINISTRATIVE REGISTER

2022 ISSUE NO. 5  
MARCH 11, 2022  
PAGES 311-366



# MONTANA ADMINISTRATIVE REGISTER

## ISSUE NO. 5

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The Rule Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Secretary of State's Office, Administrative Rules Services, at (406) 438-6122.

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BEFORE THE DEPARTMENT OF COMMERCE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 8.2.328 pertaining to actions ) PROPOSED AMENDMENT  
that qualify as categorical exclusions )  
under the Montana Environmental )  
Policy Act )

TO: All Concerned Persons

1. On March 31, 2022, at 10:30 a.m., the Department of Commerce will hold a public hearing via Zoom to consider the proposed amendment of the above-stated rule. Interested parties may access the remote conferencing platform in the following ways:

a. Video:

<https://mtgov.zoom.us/j/89798344328?pwd=Y09LVXhRdUE3SjhQdUpoRXBVbXUzQT09>

Meeting ID: 897 9834 4328

Password: 909335

b. Phone: Dial in by Telephone: 406-444-9999

Meeting ID: 897 9834 4328

Password: 909335

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Commerce no later than 5:00 p.m., March 28, 2022, to advise us of the nature of the accommodation that you need. Please contact Bonnie Martello, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2596; TDD 841-2702; fax (406) 841-2771; or e-mail [docadministrativerules@mt.gov](mailto:docadministrativerules@mt.gov).

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

8.2.328 ACTIONS THAT QUALIFY FOR A CATEGORICAL EXCLUSION

(1) through (2)(d) remain the same.

(e) projects where the footprint of the proposed structures, pipelines, or other infrastructure would be substantially unchanged from existing conditions, and there is no increase in the population served by the facility, other than that described in (3)(d)(iii); or

(f) and (f)(i) remain the same.

(ii) is commenced within six months after the date of the emergency;

(g) projects relating to existing infrastructure systems such as sewer systems, drinking water supply systems, and stormwater systems, including combined sewer overflow systems that involve:

(i) minor upgrading;

(ii) minor expansion of system capacity;

(iii) rehabilitation (including functional replacement) of the existing system and system components; or

(iv) construction of new minor ancillary facilities adjacent to or on the same property as existing facilities; or

(h) projects in unsewered communities involving the replacement of existing on-site systems, provided that the new on-site systems do not result in substantial increases in the volume of discharges or in loadings of pollutants from existing sources, and do not relocate existing discharges.

(3) through (3)(b) remain the same.

(c) the project might affect sensitive environmental or cultural resource areas or endangered or threatened species and their critical habitats;

(d) for projects related to water, sewer, or stormwater infrastructure in (2)(g), if:

(i) the action would authorize facilities that will provide a new discharge or relocate an existing discharge to ground or surface waters;

(ii) the action would result in an increase above permit levels established for the facility under the Montana pollutant discharge elimination system or Montana ground water pollution control system for either volume of discharge or loading rate of pollutants to receiving waters;

(iii) the action would authorize facilities that will provide capacity to serve a population at least 30% greater than the existing population;

(iv) the action is not supported by the state, or other regional growth plan or strategy;

(v) the action directly or indirectly involves or relates to upgrading or extending infrastructure systems primarily for the purposes of future development.

(4) remains the same.

AUTH: 2-3-103, 2-4-201, MCA

IMP: 2-3-104, 75-1-201, MCA

REASON: State agencies are provided with the option of adopting, through rulemaking, categorical exclusions that do not require further environmental review. Through the adoption of the proposed amendments, the department is clarifying the types of actions that it considers to seldom, if ever, cause significant impacts; identifying the circumstances that could cause an otherwise excluded action to potentially have significant environmental impacts; and providing a procedure whereby these situations would be discovered and appropriately analyzed.

In 2007, the Environmental Protection Agency modified its NEPA categorical exclusion criteria, as set out in 40 CFR Section 6.204. The proposed amendments to ARM 8.2.328 will modify the department MEPA exclusion criteria to conform to the

NEPA rule. The Montana Department of Environmental Quality and the Department of Natural Resources and Conservation have adopted nearly identical exclusions. The purpose of these changes is to bring the department's programs into conformance with other agencies and the corresponding NEPA exclusions in 40 CFR Section 6.204.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Department of Commerce, Director's Office, 301 South Park Avenue, P.O. Box 200501, Helena, Montana, 59620-0523; by facsimile to (406) 841-2771, or e-mail to [docadministrativerules@mt.gov](mailto:docadministrativerules@mt.gov), and must be received no later than 5:00 p.m., April 8, 2022.

5. The Office of Legal Affairs has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list may make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59620-0501, by fax to (406) 841-2701, by e-mail to [docadministrativerules@mt.gov](mailto:docadministrativerules@mt.gov), or by completing a request form at any rules hearing held by the department.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Amy Barnes  
Amy Barnes  
Rule Reviewer

/s/ Adam Schafer  
Adam Schafer  
Deputy Director  
Department of Commerce

Certified to the Secretary of State on March 1, 2022.

BEFORE THE DEPARTMENT OF COMMERCE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 8.94.3814 and 8.94.3815 ) PROPOSED AMENDMENT  
pertaining to the submission and )  
review of applications for funding )  
under the Montana Coal Endowment )  
Program (MCEP) )

TO: All Concerned Persons

1. On March 31, 2022, at 10:00 a.m., the Department of Commerce will hold a public hearing via Zoom to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

a. Video:

<https://mt-gov.zoom.us/j/85796010633?pwd=Uy9GSmlZVmNEeUFKKzVkdi9uc0VYQT09>

Meeting ID: 857 9601 0633

Password: 949343

b. Phone: Dial in by Telephone: 406-444-9999

Meeting ID: 857 9601 0633

Password: 949343

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Commerce no later than 5:00 p.m., March 28, 2022, to advise us of the nature of the accommodation that you need. Please contact Bonnie Martello, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2596; TDD (406) 841-2702; facsimile (406) 841-2771; or e-mail to [docadministrativerules@mt.gov](mailto:docadministrativerules@mt.gov).

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

8.94.3814 INCORPORATION BY REFERENCE OF RULES FOR THE  
ADMINISTRATION OF TREASURE STATE MONTANA COAL ENDOWMENT  
GRANTS (1) The Department of Commerce adopts and incorporates by reference the ~~2020 Montana Treasure State Coal Endowment Program Project Administration Manual (March 2020)~~ (March 2022) as rules for the administration of ~~TSEP MCEP~~ grants.

(2) remains the same

(3) Copies of the regulation adopted by reference in (1) may be obtained from the Department of Commerce, Community Development MT Division, 301 S. Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523, or viewed on the department's web site at <http://comdev.mt.gov/Programs/TSEP> <https://comdev.mt.gov/Programs-and-Boards/Montana-Coal-Endowment-Program/Project-Grants>.

AUTH: 90-6-710, MCA  
IMP: 90-6-710, MCA

REASON: It is reasonably necessary to amend this rule to incorporate updated information in the 2025 biennium administration manual.

8.94.3815 INCORPORATION BY REFERENCE OF RULES GOVERNING THE SUBMISSION AND REVIEW OF APPLICATIONS FOR FUNDING UNDER THE TREASURE STATE MONTANA COAL ENDOWMENT PROGRAM – PROJECT GRANTS (1) The Department of Commerce adopts and incorporates by reference the ~~2020 Montana Treasure State Coal Endowment Program 2022 Construction Application Guidelines for the 2025 Biennium (March 2020)~~ as rules governing the submission and review of applications under the ~~TSEP~~ MCEP program.

(2) and (2)(a) remain the same.

(b) types of grants available under ~~TSEP~~ MCEP;

(c) general requirements for applying for ~~TSEP~~ MCEP grants; and

(d) remains the same.

(3) Copies of the regulation adopted by reference in (1) may be obtained from the Department of Commerce, Community Development MT Division, 301 S. Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523, or viewed on the department's web site at <http://comdev.mt.gov/Programs/TSEP> <https://comdev.mt.gov/Programs-and-Boards/Montana-Coal-Endowment-Program/Project-Grants>.

AUTH: 90-6-710, MCA  
IMP: 90-6-710, MCA

REASON: It is reasonably necessary to amend this rule to incorporate updated information in the 2025 biennium guidelines.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Department of Commerce, Community MT Division, 301 South Park Avenue, P.O. Box 200523, Helena, Montana, 59620-0523; by facsimile to (406) 841-2771, or e-mail to [docadministrativerules@mt.gov](mailto:docadministrativerules@mt.gov), and must be received no later than 5:00 p.m., April 8, 2022.

5. The Office of Legal Affairs has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list may make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59620-0501, by fax to (406) 841-2701, by e-mail to [docadministrativerules@mt.gov](mailto:docadministrativerules@mt.gov), or by completing a request form at any rules hearing held by the department.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Amy Barnes  
Amy Barnes  
Rule Reviewer

/s/ Adam Schafer  
Adam Schafer  
Deputy Director  
Department of Commerce

Certified to the Secretary of State on March 1, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
OF THE STATE OF MONTANA

In the matter of the repeal of ARM	)	NOTICE OF PROPOSED REPEAL
24.15.101 and 24.15.501 pertaining to	)	
the Employment Relations Division	)	NO PUBLIC HEARING
	)	CONTEMPLATED

TO: All Concerned Persons

1. The Department of Labor and Industry proposes to repeal the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on April 1, 2022, to advise us of the nature of the accommodation that you need. Please contact Brandon Kirchgasler, P.O. Box 1728, Helena, Montana 59624-1728; telephone (406) 444-3359; or Montana Relay Service at 711; or e-mail bkirchgasler@mt.gov.

3. The rules proposed to be repealed are as follows:

24.15.101 DIVISION ORGANIZATION

AUTH: 2-4-201, MCA  
IMP: 2-4-201, MCA

24.15.501 ADOPTION OF MODEL RULES

AUTH: 2-4-201, MCA  
IMP: 2-4-202, MCA

REASON: Reasonable necessity exists to repeal both rules because they are archaic and duplicative. The division organization is set forth in the department's organizational rule at ARM 24.1.101. This organizational rule is out of date. The adoption of model rules is unnecessary and duplicative because the adoption is effectuated department-wide by ARM 24.2.101. These rules were identified as part of Red Tape Relief efforts.

4. Concerned persons may present their data, views, or arguments in writing to Brandon Kirchgasler, P.O. Box 1728, Helena, Montana 59624-1728, or e-mail bkirchgasler@mt.gov., and must be received no later than 5:00 p.m., April 8, 2022.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make a written request for hearing and submit the request along with any written

comments by the means set forth in Paragraph 4 no later than April 8, 2022. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. The department believes all Montanans are equally affected by these rules. As such, if 25 people request a hearing, one will be held.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the contact person in paragraph 4 above or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. Pursuant to 2-4-111, MCA, the department has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
OF THE STATE OF MONTANA

In the matter of the Workforce                    ) NOTICE OF PUBLIC COMMENT  
Innovation and Opportunity Act                 )  
Montana State Plan Modifications             )

TO: All Concerned Persons

1. Until April 11, 2022, the Department of Labor and Industry (department) will accept public comments regarding the Workforce Innovation and Opportunity Act Montana State Plan Modifications.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public comment process or need an alternative accessible format of this notice. If you require an accommodation, contact the department to advise us of the nature of the accommodation that you need. Please contact Wes Feist, P.O. Box 1728, Helena, Montana 59604; telephone (406) 444-4480; Montana Relay 711; or e-mail wesley.feist@mt.gov.

3. The State Plan is available for review at [swib.mt.gov/program-information/state-plan](http://swib.mt.gov/program-information/state-plan). Printed versions are available upon request.

4. After public comments are received, the department will consider and incorporate the comments into the final State Plan Modifications.

5. Concerned persons may submit their data, views, or arguments in writing to Wes Feist, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59604, or by e-mail to: [wesley.feist@mt.gov](mailto:wesley.feist@mt.gov), and must be received no later than April 11, 2022, at 5:00 p.m.

/s/ Laurie Esau  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
OF THE STATE OF MONTANA

In the matter of the multidisciplinary ) NOTICE OF PUBLIC COMMENT  
health care provider task force review )  
of statutes and recommendations )  
involving physicians, physician )  
assistants, and advanced practice )  
registered nurses )

TO: All Concerned Persons

1. Chapter 424, L. 2021 (House Bill 495) created a five-member Multidisciplinary Health Care Provider Task Force (task force) of executive branch representatives from the Department of Labor and Industry, Business Standards Division; the Board of Medical Examiners; the Board of Nursing; the Department of Public Health and Human Services; and the Insurance Commissioner of the State Auditor's Office. House Bill 495 requires that the task force submit a report of proposed legislation to the Children, Families, Health, and Human Services Interim Committee (CFHHS).

The Department of Labor and Industry, Business Standards Division (BSD) is the administratively attached agency. For additional information on the Task Force Charter and Written Plan, see postings under "Previous Meetings" on the DLI BSD website, [bsd.dli.mt.gov/hb495](http://bsd.dli.mt.gov/hb495).

2. The task force met September 28, 2021, November 18, 2021, and February 17, 2022, to consider all statutes potentially impacted by House Bill 495. The task force received oral and written comments regarding possible amendments to the statutes from stakeholder agencies, agency task force members, professional associations, and interested members of the public, both during and following the task force meetings.

3. The task force further requested information from stakeholder agencies (i.e., agencies with duties related to the selected statutes) on December 7, 2021, "to identify forms that only elicit the signature of a 'physician' but should be amended to reflect the ability of other health care providers to sign." The results of this survey were discussed at the February 17, 2022, meeting and are incorporated into the minutes, available on the DLI BSD website, [bsd.dli.mt.gov/hb495](http://bsd.dli.mt.gov/hb495).

4. During its last meeting, the task force reviewed and approved a final recommendation of the list of statutes and proposed amendments for a public comment period. The list, entitled "List of Statutes 02102022," may be found electronically under the February 17, 2022, meeting on the DLI BSD website, [bsd.dli.mt.gov/hb495](http://bsd.dli.mt.gov/hb495).

5. This notice is to elicit public comment on the list of statutes and proposed amendments. After the expiration of the comment period, the task force will again meet to discuss the comments and issue a final recommendation to the CFHHS.

6. On April 15, 2022, at 10:00 a.m., a public hearing will be held via remote conferencing to consider the proposed recommendations in the above-referenced list. There will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

- a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/82198291451>  
Meeting ID: 821 9829 1451, Passcode: 955905
- OR-
- b. Dial by telephone, +1 406 444 9999 or +1 656 558 8656  
Meeting ID: 821 9829 1451, Passcode: 955905

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

7. Public and private agencies and persons may submit their data, views, or arguments to the public comment opportunity portal on the DLI BSD website, [bsd.dli.mt.gov/hb495](https://bsd.dli.mt.gov/hb495). This portal will allow commenters to easily identify items on the list and facilitate the department's summary of comments received. Data, views, or arguments may also be submitted in writing to Missy Poortenga, Department of Labor and Industry, P.O. Box 200513, Helena, MT 59620-0513, or by e-mail [dlihb495@mt.gov](mailto:dlihb495@mt.gov). All comments must be received no later than Friday, April 29, 2022, at 5:00 p.m.

8. The department will make reasonable accommodations for persons with disabilities who wish to submit written comments or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., April 1, 2022, to advise us of the nature of the accommodation you need. Please contact Missy Poortenga, P.O. Box 200513, Helena, MT 59620-0513; telephone (406) 444-6880; Montana Relay 711; or e-mail [dlihb495@mt.gov](mailto:dlihb495@mt.gov).

/s/ LAURIE ESAU

Laurie Esau, Commissioner

DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 1, 2022.

BEFORE THE BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of )  
ARM 24.129.603 minimum licensure ) NOTICE OF PUBLIC HEARING ON  
standards ) PROPOSED AMENDMENT

TO: All Concerned Persons

1. On April 1, 2022, at 8:30 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment of the above-stated rule. There will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/89210308306?pwd=Y3BpMml3Umh1SEk5L1dYblAyb2NLdz09>  
Meeting ID: 892 1030 8306, Passcode: 376211 -

OR-

b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656  
Meeting ID: 892 1030 8306, Passcode: 376211

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Clinical Laboratory Science Practitioners no later than 5:00 p.m., on March 25, 2022, to advise us of the nature of the accommodation that you need. Please contact Kelly Welsh, Board of Clinical Laboratory Science Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2258; Montana Relay 711; facsimile (406) 841-2305; or [dlibsdcsls@mt.gov](mailto:dlibsdcsls@mt.gov) (board's e-mail).

3. The rule proposed to be amended is as follows, stricken matter interlined, new matter underlined:

·  
24.129.603 MINIMUM STANDARDS FOR LICENSURE (1) remains the same.

(2) Examinations administered by the following national certification agencies are approved by the board:

(a) through (f) remain the same.

(g) National Registry of Certified Chemists (NRCC);

(g) and (h) remain the same but are renumbered (h) and (i).

(3) and (4) remain the same.

AUTH: 37-1-131, 37-34-201, MCA  
IMP: 37-1-131, 37-34-303, MCA

REASON: The board determined it is reasonably necessary to amend this rule to add the National Registry of Certified Chemists (NRCC) to the approved list of examination agencies. Following receipt of an applicant's request to accept the NRCC license examination, the board considered a similar request from the NRCC executive director and board. Noting that the NRCC is a national certifying agency recognized by all other United States jurisdictions, the board concluded that it is appropriate to align with the national advancements and add NRCC to its approved list of license examination certifying bodies.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Clinical Laboratory Science Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or e-mail to [dlibsdcsls@mt.gov](mailto:dlibsdcsls@mt.gov), and must be received no later than 5:00 p.m., April 8, 2022.

5. An electronic copy of this notice of public hearing is available at <https://boards.bsd.dli.mt.gov/clinical-laboratory-science-practitioners> (department and board's website). Although the department strives to keep its websites accessible at all times, concerned persons should be aware that websites may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a website do not excuse late submission of comments.

6. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Clinical Laboratory Science Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to [dlibsdcsls@mt.gov](mailto:dlibsdcsls@mt.gov); or made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. Regarding the requirements of 2-4-111, MCA, the board has determined that the amendment of ARM 24.129.603 will not significantly and directly impact small businesses.

Documentation of the board's above-stated determination is available upon request to the Board of Clinical Laboratory Science Practitioners, 301 South Park

Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2258; facsimile (406) 841-2305; or to [dlibsdcsls@mt.gov](mailto:dlibsdcsls@mt.gov).

9. Department staff has been designated to preside over and conduct this hearing.

BOARD OF CLINICAL LABORATORY  
SCIENCE PRACTITIONERS  
MATTHEW KALANICK, CLSP  
BOARD CHAIR

/s/ DARCEE L. MOE  
Darcee L. Moe  
Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS  
OF THE STATE OF MONTANA

In the matter of the transfer of ARM     ) NOTICE OF TRANSFER  
12.3.105, 12.3.110, 12.3.112,     )  
12.3.113, 12.3.115, 12.3.116,     )  
12.3.122, 12.3.123, 12.3.131,     )  
12.3.132, 12.3.133, 12.3.134,     )  
12.3.135, 12.3.140, 12.3.160,     )  
12.3.165, 12.3.185, 12.3.186,     )  
12.3.187, 12.3.402, 12.3.403,     )  
12.3.404, 12.3.410, and 12.3.411     )  
pertaining to licensing     )

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) transfers the above-stated rules.

2. On February 25, 2022, the department and the Fish and Wildlife Commission published MAR Notice No. 12-551, a notice of adoption, amendment, and repeal of administrative rules pertaining to licensing. The department has determined the transfer of these rules will consolidate the amended rules for clarity.

3. The transferred rules are assigned the following numbers:

<u>OLD</u>	<u>NEW</u>	
12.3.105	12.3.503	LIMITATION ON NUMBER OF HUNTING LICENSES
12.3.110	12.3.501	DEFINITIONS
12.3.112	12.3.617	ANTELOPE LICENSES
12.3.113	12.3.619	ELK PERMITS
12.3.115	12.3.618	DEER PERMITS
12.3.116	12.3.620	MOOSE, SHEEP, AND GOAT LICENSES
12.3.122	12.3.504	EXCESS LICESNSES/PERMITS
12.3.123	12.3.616	ALTERNATE LIST
12.3.131	12.3.801	PROPOSALS FOR LICENSES SOLD BY AUCTION OR LOTTERY

12.3.132	12.3.802	PROCEDURE FOR SUBMITTING PROPOSALS AND AWARDED AN AUCTION OR LOTTERY LICENSE
12.3.133	12.3.803	ISSUANCE AND USE OF A LICENSE SOLD BY AUCTION OR LOTTERY
12.3.134	12.3.621	MOOSE, SHEEP, AND GOAT - SEVEN-YEAR WAIT REQUIREMENT
12.3.135	12.3.603	BONUS POINTS
12.3.140	12.3.601	APPLICATION FOR DRAWINGS
12.3.160	12.3.602	PARTY APPLICATIONS
12.3.165	12.3.626	APPLICATION ERRORS
12.3.185	12.3.622	SUPER-TAG HUNTING LICENSES
12.3.186	12.3.511	SALVAGE PERMITS
12.3.187	12.3.510	APPRENTICE HUNTER CERTIFICATE
12.3.402	12.3.627	LICENSE AND PERMIT REFUNDS
12.3.403	12.3.513	REPLACEMENT LICENSES AND PERMITS
12.3.404	12.3.514	ANIMALS UNFIT FOR HUMAN CONSUMPTION
12.3.410	12.3.629	EXTENSION OF DEADLINES
12.3.411	12.3.515	HUNTERS AGAINST HUNGER

/s/ Zach Zipfel  
Zach Zipfel  
Rule Reviewer

/s/ Hank Worsch  
Hank Worsch  
Director  
Department of Fish, Wildlife and Parks

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT AND
17.30.1304 and the adoption of New )	ADOPTION
Rule I pertaining to definitions and the )	
development process for the adaptive )	(WATER QUALITY)
management program to implement )	
narrative nutrient standards )	

TO: All Concerned Persons

1. On December 23, 2021, the Department of Environmental Quality (department) published MAR Notice No. 17-420, pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 1876 of the 2021 Montana Administrative Register, Issue No. 24.

2. The department has adopted NEW RULE I (ARM 17.30.1388) exactly as proposed.

3. The department has amended ARM 17.30.1304 exactly as proposed.

4. The department has thoroughly considered the comments received. A summary of the comments received, and the department's responses are as follows:

COMMENT NO. 1: The department received multiple comments asking it to retain the numeric water quality standard for nutrients and not replace the science-based numeric water quality standards with narrative standards.

RESPONSE: During the 2021 legislative session, the Montana Legislature enacted Senate Bill (SB) 358. SB 358 directs the department and the Board of Environmental Review to amend specified administrative rules to delete all references to Circular DEQ-12A, Circular DEQ-12B, base numeric nutrient standards, and nutrient standards variables. SB 358 further requires the department to adopt rules related to narrative standards in consultation with the Nutrient Work Group. The rules are required to provide for the development of an adaptive management program which provides for an incremental watershed approach for protecting and maintaining water quality.

Despite a concerted effort by the department and the nutrient work group to develop a comprehensive rule package, there remains a substantial amount of work needed for the department to fully address the concerns of multiple parties. Rather than immediately move forward with a comprehensive rule package, the department has proposed in the rulemaking to establish the basic elements of an adaptive management program required under SB 358. The "framework" established under this rulemaking is only a first step in implementing SB 358. Substantive rules setting forth specifics of the adaptive management program, as well as the required deletion of state numeric nutrient standards, are not part of this rulemaking. The substantive rules and deletion of numeric nutrient standards will be addressed later in 2022.

COMMENT NO. 2: The department received multiple comments asserting that narrative water quality standards are vague, subjective, and less protective than numeric water quality standards.

RESPONSE: Narrative water quality standards can and do protect the beneficial uses of state surface water bodies (examples of beneficial uses include aquatic life, recreation, and drinking water). The department has developed narrative water quality standards for a variety of pollutants. In addition, the numeric water quality standards found in Circular DEQ 12-A only apply to a portion of state surface water bodies, while the remaining surface water bodies are protected by narrative nutrient water quality standards. As previously indicated, the department will initiate rulemaking later in 2022 to adopt a comprehensive rule package including implementation details to provide specific and enforceable requirements. See response to No. 1.

COMMENT NO. 3: This new program removes a proven system of pollution control (numeric nutrient criteria) in favor of an untested new rule program (narrative nutrient criteria) that appears to favor special interests and lacks a strong scientific basis which creates substantial uncertainty for property owners, recreationists, and our economy.

RESPONSE: See responses to Nos. 1 and 2.

COMMENT NO. 4: The department received multiple comments expressing concern about the rules' focus on the minimization of phosphorus. These comments emphasized that both nitrogen and phosphorus reductions are important to water quality.

RESPONSE: Where appropriate for the stream and effluent concentrations, phosphorus reductions can improve and protect water quality. The department acknowledges there will be circumstances where phosphorus reductions alone will not be adequate to protect beneficial uses of state waters and, as a result, reductions in nitrogen will be necessary. See response to No. 1.

COMMENT NO. 5: New Rule I only requires an "implementation plan" for an adaptive management program where narrative standards are not being met and beneficial uses are not being protected. This represents an alarming shift away from a proactive, scientifically sound system of nutrient pollution management in favor of a "crisis management" approach that will either maintain the status quo on degraded waterways or (worse yet) allow for further degradation from nutrient pollution.

RESPONSE: The comment misstates the rule language; New Rule I does not state the specific conditions under which an adaptive management plan is required. The department and the Nutrient Work Group continue to work on the details of when an adaptive management plan will be required. See response to No. 1.

COMMENT NO. 6: The Clark Fork River, in decades past, provides a case study: by the time excessive *Cladophora* (algae) growth was evident, the damage had already been done to fish populations. Excessively low dissolved oxygen only

occurred a few hours each day and a few weeks each year, but for fish anything more than a few minutes was catastrophic. How can narrative standards identify both the problem and determine the proper course of treatment before the damage is done?

RESPONSE: The numeric nutrient standards applicable to the Clark Fork River are found at ARM 17.30.631 and are not included in the specified rules requiring amendment to delete references to numeric nutrient standards. Therefore, the numeric nutrient standards applicable to the Clark Fork River will remain effective and are not modified under this rulemaking or under SB 358. ARM Title 17, chapter 30, subchapter 6 also includes water quality standards for dissolved oxygen. See responses to Nos. 1 and 2.

COMMENT NO. 7: The department received multiple comments stating that increased housing development is negatively impacting our state's surface water quality and is associated with increased algae blooms.

RESPONSE: Thank you for your comment. The department acknowledges increased housing development may lead to the introduction of excess nutrients in ground and surface waters.

COMMENT NO. 8: An adaptive management program is required by SB 358. The plan will allow permitted regulators such as industry or municipal wastewater to contract with non-permitted dischargers to bring down overall nutrient discharges in a waterbody. Diluting the effluent is not the remedy.

RESPONSE: See responses to Nos. 1 and 2.

COMMENT NO. 9: The department received multiple comments regarding nutrient and harmful algae blooms in Montana.

RESPONSE: The department acknowledges that excess nutrients (nitrogen and phosphorus) can encourage harmful algal blooms, particularly in lakes and reservoirs. See response to Nos. 1 and 2.

COMMENT NO. 10: The department received multiple comments stating that prevention is less expensive than clean-up efforts, and that there is potential for industry to increase profits if less investment is required for environmental control.

RESPONSE: See responses to Nos. 1 and 2.

COMMENT NO. 11: The department received multiple comments raising concern that increased nutrient loading increases algae levels in surface waters.

RESPONSE: The department acknowledges that excess nutrient loading of nitrogen and phosphorus can increase algae levels in surface waters. See responses to Nos. 1 and 2.

COMMENT NO. 12: Excessive, uncontrolled nutrient pollution entering our rivers and lakes puts the second largest economic driver of our economy (outdoor recreation) and our unique aquatic resources that attract visitors from around the world at risk. Montana's economy benefits from tourism and recreation generated by state surface waters and fisheries. This change in water quality standards will

negatively impact surface water bodies, recreation, and fisheries.

RESPONSE: Regarding the tourism and recreational economy of Montana, narrative water quality standards protect beneficial uses of state surface water bodies. Recreation is an identified beneficial use listed and protected in most surface water beneficial use classifications. See responses to Nos. 1 and 2.

COMMENT NO. 13: The department received multiple comments stating that narrative standards are unenforceable, and related concerns regarding regulated point sources discharges not being required to treat their effluent.

RESPONSE: Montana Pollutant Discharge Elimination System (MPDES) permits regulate point source discharges of pollutants to state surface waters. When a point source discharger has the reasonable potential to cause or contribute to an exceedance of a water quality standard, whether the standard is narrative or numeric, enforceable permit conditions are developed and included in the MPDES permit. These enforceable conditions may include monitoring effluent concentrations, and effluent limits both numeric and narrative. Numeric effluent limits are concentrations or load limits for the effluent. The department may also develop narrative effluent limits such as specific optimization efforts to ensure the wastewater treatment facility is running efficiently.

COMMENT NO. 14: Numeric standards give design engineers for point source dischargers a quantified target.

RESPONSE: When appropriate, MPDES permits regulating point source discharges of pollutants will include enforceable numeric effluent limits. See response to No.13.

COMMENT NO. 15: The department received multiple comments raising concerns regarding drought conditions in Montana and the potential for increased algae blooms.

RESPONSE: See responses to Nos. 1 and 11.

COMMENT NO. 16: Can the department use measured data to interpret and implement the narrative water quality standard?

RESPONSE: See response to Nos. 13 and 83. Further details regarding implementation, monitoring plans, etc. will be provided in the rulemaking later in 2022 as part of the comprehensive rule package. See response to No. 1.

COMMENT NO. 17: I am aware that a well-established body of science shows that controlling nutrient pollution is best accomplished by the use of numeric nutrient criteria, and that point sources of pollution are required by federal law to have stringent permit limits so that their discharges do not cause or contribute to violations of water quality standards. DEQ's proposed rulemaking would eliminate proactive, science-based pollution controls and require use of a new, unproven adaptive management program, representing a critical failure of our government to protect local water quality in our streams, rivers, and lakes on the basis of a proven strategy at law and based in strong science.

RESPONSE: See responses to Nos. 1, 2, and 13.

COMMENT NO. 18: According to DEQ statistics, 33% of streams and 22% of our lakes and reservoirs are already degraded by unhealthy nutrient pollution. To repair Montana's waterways, the state adopted science-based "numeric" nutrient water quality standards in 2015, which would be implemented over twenty years. These numeric standards enable efficient, nonpartisan implementation of pollution controls for major polluters and increase the efficiency of river restoration projects by having objective targets. Science-based standards provide clarity about the goals for river protection.

RESPONSE: Nutrients are the third-most-prevalent stressor to beneficial uses identified in Montana's list of impaired waters, but the commenters statistics are not correct. According to the 2020 Integrated Report, 15% of administratively applicable stream mileage and 19% of lake acreage in Montana are identified as impaired for nutrients. The department develops Total Maximum Daily Loads or TMDL documents, which are watershed plans to restore the beneficial uses of impaired water bodies regardless of whether the nutrient water quality standard is narrative or numeric. The department will continue to develop and implement TMDLs to restore nutrient impaired waterbodies. See responses to Nos.1 and 2.

COMMENT NO. 19: Excessive nutrient loading in our rivers and streams results in green algal blooms, impaired water quality, and degraded fishery and aquatic habitat. Old-timers recall the Jefferson River as a clear stream filled with western pearlshell mussels, and mussel shells remain common in gravel bars along the river. Today, however, the Jefferson is often choked with green moss and dirty organic matter, and mussels have become rare. We oppose the amendment of ARM 17.30.1304 and adoption of New Rule I, and we encourage the DEQ to focus limited resources on protecting Montana's waterways, rather than consuming time changes in the rules to accommodate polluters.

RESPONSE: Thank you for your comment and long-term perspective on the Jefferson River. See responses to Nos. 1 and 2.

COMMENT NO. 20: We are in full support of the rules as proposed in MAR Notice No. 17-420. SB 358 authorizes for Montana the same process that many other U.S. states use successfully to protect waters from nutrients and what EPA itself has encouraged states to do—adaptive management. Under this framework, stakeholders in protecting Montana's water quality and beneficial uses can more effectively, accurately, and affordably determine how best to address all nutrient contributions to a waterbody. The iterative adaptive management process will provide a scientifically supported and comprehensive assessment of Montana's watersheds and provide information about existing water quality conditions, stream-specific conditions, and the specific contributions to nutrient loads in a water body. This process will then result in the development of prioritized, implementable, and evaluated actions that will actually improve surface waters without wasting millions of public and private dollars where additional point-source treatment actions are not necessary or beneficial. And, the new law sets the stage to advance the voluntary use of best management practices by non-regulated entities that can actually make a difference in water quality.

RESPONSE: Thank you for your comment.

COMMENT NO. 21: New Rule I aligns with the spirit of EPA's memo of March 16, 2011 written by then-Acting EPA Administrator Nancy Stoner. The memo notes that the EPA-state partnership should work to develop a framework to address nutrients tailored to the particular circumstances in a state, taking into account existing tools and resources, innovative approaches, and the need to engage all sectors and parties to achieve sustained progress.

RESPONSE: Thank you for your comment. The department has reviewed the U.S. Environmental Protection Agency memo you cite and will take it under advisement.

COMMENT NO. 22: New Rule I sets forth a roadmap for implementing a regulatory program that better ensures significant financial investments made in a watershed will result in actual water quality improvements. This approach allows those on the ground in Montana to identify the best strategy for reducing nutrient sources to create the biggest impact.

RESPONSE: Thank you for your comment.

COMMENT NO. 23: The language in these definitions (at ARM 17.30.1304(3)(b) through (e)) leaves many unanswered questions, such as how the framework will ensure nondegradation of water quality, whether it will allow for backsliding in individual discharge permits, and how the framework will address water quality impairment and permit compliance.

RESPONSE: The proposed rulemaking includes definitions of the Adaptive Management Plan and Adaptive Management Program along with some essential elements that provide context for what the department will include in a comprehensive rule package later in 2022. See response to No. 1.

COMMENT NO. 24: I strongly support these changes to use a watershed approach as compared to numeric standards. Farmers use less fertilizer than they need, largely due to costs. With the dramatic change in farming practices, soil erosion from wind and water are almost absent from dry land farming. Technology has vastly changed farming practices in Montana. Intensive farming on the irrigated lands are the heaviest users of fertilizers, especially for high use crops such as corn and sugar beets. Traditional flood irrigation has been replaced by sprinkler systems, underground pipelines, and gated pipe. Deep leaching of fertilizers by over irrigation is vastly decreased. Again, the new technology and economic costs have been a major driver in reducing the loss of nitrogen and phosphorus to our water. The past numeric DEQ water quality standards are very difficult to use, understand, and implement. The best method for solving non-point nutrient issues is by a watershed approach to planning and implementation.

RESPONSE: Thank you for your comment.

COMMENT NO. 25: I oppose the removal of numeric nutrient standards in Montana. As a fisherman I have to be on constant look out for lethal blue-green algae blooms which can kill my dogs. Blue-green algae can produce both nerve

toxins (neurotoxins) and liver toxins (hepatotoxins). It can also kill people, cattle, or wildlife. Blue-green algae have been appearing more frequently in Hyalite Reservoir and Hebgen Lake, places I have stopped fishing due to the warnings of harmful algae. Also the low flows in the upper Missouri watershed have created blue-green algae blooms throughout the rivers themselves. We need to regulate nitrogen and phosphorus properly throughout our waterways. Also other non-lethal algae blooms have been popping up in many rivers. It is extremely disturbing to see the Beaverhead River turn from a large deep clear-like spring creek to a low muddied bright green river in certain areas. Moisture was low last year in southwestern Montana, especially on the Madison River. As the rivers heat up during drought years, we could see more algae blooms, fungal infections on fish, and increased parasite activities which all lead to increased fish kills. Nothing is more disturbing as a fisherman than holding a brown trout with fungal infections all over its body or seeing a white fish float by you battered up but still alive because it is in shock from PKD disease which attacks the fishes' kidneys putting them in a state of shock until they die. When you see these disturbing things you cannot help but think how can we improve our watersheds for the aquatic food web and ourselves as people who drink from these rivers.

RESPONSE: Thank you for your comment. See responses to Nos. 1, 9 and 11.

COMMENT NO. 26: The department received multiple comments regarding pharmaceuticals and fertilizers in Montana's surface water bodies.

RESPONSE: Pharmaceuticals in state surface waters are outside the scope of this rulemaking. Regarding fertilizers, the department acknowledges that they can be a source of nitrogen and phosphorus to state surface waters. Under MAR Notice No. 17-420, the department was accepting comments regarding outlining essential elements of the Adaptive Management Program as a component of implementing Montana's narrative nutrient standards. See response to No. 24.

COMMENT NO. 27: The department received multiple comments regarding the lack of a definition of a "watershed" in New Rule I.

RESPONSE: The comment is correct. No definition for watershed was provided. The rules available for comment under MAR Notice No. 17-420 included definitions of "Adaptive Management Plan" and "Adaptive Management Program," along with some essential elements that provide context for what the department will include in a comprehensive rule package later in 2022. See response to No. 1.

COMMENT NO. 28: The process that is contemplated will create an immense amount of additional work. (See your definition of "adaptive management plan.") Who will do it? Is DEQ being given additional funds for this purpose?

RESPONSE: Adaptive Management Plan development will be a coordinated effort between the regulated community, department staff, and other stakeholders in the watershed. The department anticipates some additional workload and will balance resources to support Adaptive Management Plan development.

COMMENT NO. 29: The department must establish Adaptive Management Plan/Program criteria prior to receiving draft plans from permittees. All Adaptive Management Plans must include an Implementation Plan for corrective actions to proactively prohibit water quality degradation. Permittees should achieve compliance by minimizing nutrients within their discharge, instead of minimizing equivalent nutrient reduction within the watershed.

RESPONSE: Thank you for the comment. Under SB 358, the rules must include a watershed approach for protecting and maintaining water quality. See responses to Nos. 1 and 44.

COMMENT NO. 30: The department received multiple comments regarding the outdoor recreation economy and associated jobs and businesses it supports, and the potential impact on Montana's economy due to declining water quality.

RESPONSE: The department acknowledges that outdoor recreation is a large component of the state's economy, and that deterioration in water quality could impact this sector of the economy. See response to Nos. 2 and 12.

COMMENT NO. 31: The federal Clean Water Act requires states to designate beneficial uses for all waters and develop water quality standards to protect each use. States either develop their own criteria or implement federal criteria. These criteria must accurately reflect the latest scientific knowledge. They are based solely on data and scientific judgments about pollutant concentrations and their effects on the environment, aquatic life, and human health.

RESPONSE: The department agrees that water quality criteria must be adopted to protect designated beneficial uses and such criteria must be based on sound scientific rationale. Designated uses may also be established based upon the highest attainable use and other factors. 40 C.F.R. § 131.10(g). Time-limited designated uses and criteria for specific pollutants may also be adopted under 40 C.F.R. § 131.14, as water quality standards variances, and are fully consistent with the goals of the federal Clean Water Act (i.e., to support aquatic life and recreational uses wherever attainable).

COMMENT NO 32: Human Health: All Montana communities and families rely upon clean water for drinking and producing the food we eat. By removing the standards that determine whether a waterbody is polluted by nitrogen and phosphorus - the most pervasive pollutants threatening Montana's waterways - the health of Montanans' drinking and irrigation, and livestock water becomes uncertain. This rollback prioritizes industry and corporate polluters over the health of Montana citizens and communities.

RESPONSE: Montana has an adopted human health criterion for nitrate plus nitrite of 10 mg/L. This numeric water quality standard remains effective and enforceable and protects human health. See responses to Nos. 1 and 2.

COMMENT NO. 33: It is important that watershed-specific adaptive management plans allow watersheds that already have approved numeric standards be allowed to continue to enforce those standards, if that can be done under 75-5-401, MCA. It is important that any new rule emphasizes that "beneficial uses"

includes aquatic life and fish, as listed in the Montana Water Quality Standards, not just uses that directly benefit recreation, human health, agriculture, and industry. Lastly, it is important that other possible qualitative indicators of high nutrients (possibly indicators of low oxygen levels) are included in the new standards, not just visual observation of algae.

RESPONSE: See responses to Nos. 1 and 2. The department considers all beneficial uses when evaluating the effects of a pollutant. The department acknowledges that other indicators, like low dissolved oxygen levels or elevated pH, are related to elevated nutrient concentrations in surface waters. The department anticipates a comprehensive rule package later in 2022, outlining technical, procedural, and implementation details of the narrative nutrient standard and the adaptive management program. The department looks forward to additional comments on the detailed and comprehensive rule package.

COMMENT NO. 34: Montana has 396 streams and rivers on its 303-d list of impaired waterbodies. Every one of these have a narrative standard to attempt bringing them back into CWA compliance. In 42 years of watching DEQ's performance, not a single one of these waterbodies has come off the 303-d list. That is the result of narrative standards.

RESPONSE: Beneficial use assessments that inform Montana's 303(d) list (part of the Integrated Report) evaluate both narrative and numeric standards. Montana tracks successful restoration at a waterbody/pollutant combination level. Montana has approximately 630 impaired stream/river units, with six that have at least one pollutant successfully restored and six more that are fully restored to meeting standards.

COMMENT NO. 35: As climate change progresses, warmer water in summer will have less capacity to hold dissolved oxygen, accentuating diurnal oxygen depletion, one of the primary impacts of nutrient-caused algal blooms. Failure to maintain beneficial uses could cause a reversion of water permitting authority from the state back to the federal EPA.

RESPONSE: The commenter's description of the effect of warmer water on dissolved oxygen is correct. The department acknowledges that protection of Montana's beneficial uses is of utmost importance. See response to Nos. 2 and 57.

COMMENT NO. 36: It is premature for the department to propose a definition and required components of this Adaptive Management Program. This language should not be adopted until the details of the entire program have been developed by the department to ensure protection of water quality. The roles and responsibilities related to implementation of the adaptive management process are not addressed in the New Rule I language. It is critical that these roles are clearly defined before being incorporated into the ARM to ensure the department maintains its authority as the decision-maker. As drafted, it is unclear whether the permittee or the department is responsible for specific aspects of this program. The watershed-based Adaptive Management Program should be developed and administered by the department. The department should be responsible for development and implementation of the watershed-based Adaptive Management Program, and within

that structure to quantify other sources of nutrient pollution to the watershed (e.g., nonpoint sources, faulty septic systems) and prioritize source reduction measures to restore water quality impairments. The permit holder should be responsible for development of an Adaptive Management Plan to use as a tool to monitor and, if needed, identify and mitigate impacts from their point source discharge(s). The department's Adaptive Management Program for a defined watershed unit should be developed to account for all known discharges within a watershed, and then provide the framework and process to encourage programmatic coordination that is designed to encourage watershed-wide water quality improvements associated with both point and nonpoint discharges. One component of this watershed-based program should be development and implementation of the Adaptive Management Plan(s) for MPDES permitted point source discharge(s). Other components of the watershed-based Adaptive Management Program include non-point discharge (TMDL), prioritization of action steps for waterbodies with beneficial use impairments.

RESPONSE: SB 358 requires the department to adopt rules related to narrative nutrient standards by March 1, 2022. The department agrees that it will be important to define implementation roles and responsibilities of the Adaptive Management Program and will continue to work with the nutrient work group on establishing responsibilities and developing the entire program. See response to No. 1.

COMMENT NO. 37: The definitions proposed in New Rule I for "Adaptive management plan" and "Adaptive management program" are too general and lack sufficient detail to understand how adoption of New Rule I will ensure the same level of protectiveness to water quality as the numeric nutrient criteria currently relied upon in Montana to ensure nondegradation of water quality associated with nutrient loading from permitted dischargers to groundwater and surface water. Final language should not be adopted until the details of the adaptive management program are developed by DEQ and have been through a public comment period. The Adaptive Management Plan definition needs to include a clear connection to the MPDES Permit discharge limits and permit requirements. We would like DEQ to consider the following comments and suggestions to the language proposed in New Rule I.

"Adaptive management plan" means a watershed-specific plan developed under the adaptive management program to achieve the narrative nutrient standards, associated MPDES Permit limits, and address ensure non-degradation of a specific watershed from permitted nutrient sources in a specific watershed. An adaptive management plan includes a watershed monitoring plan and, if required, an implementation plan that defines a process to identify and take steps to reduce nutrient pollution loading to a an impaired watershed.

"Adaptive management program" is defined as a "watershed-scale program that protects water quality from the impacts of nutrient sources by:

(a) prioritizing nitrogen and phosphorus reduction, as appropriate, while accounting for site specific conditions;

- (b) allowing for nutrient sources to be addressed incrementally over time by incorporating flexible decision-making which can be adjusted as management actions and other factors become better understood;
- ~~(c) reasonably balancing all factors impacting a waterbody while considering the relative cost of treatment options, their feasibility, and their expected water quality improvement;~~
- (d) identifying specific nutrient reduction requirements; and
- (e) setting as its goal the protection, and achievement, and restoration of beneficial uses of the waterbody."

RESPONSE: Thank you for your recommendations. Ongoing work by the department and the Nutrient Work Group may require additional edits to these definitions as the comprehensive rule package is prepared for rulemaking later in 2022. No changes will be made at this time. The department will consider your recommendations as we proceed. See responses to Nos. 1 and 36.

COMMENT NO. 38: In the Adaptive Management Plan definition, (3)(b) states: "allowing for nutrient sources to be addressed incrementally over time by incorporating flexible decision-making which can be adjusted as management actions and other factors become better understood." This does not provide sufficient detail to understand the intent of the language and how it would be applied in practice. This concept seems logical in the scenario where DEQ is administering the Adaptive Management Program as a tool for decision-making to prioritize management actions that will result in the most effective reductions in nutrient pollution to an impaired watershed. Implementation of a successful Adaptive Management Program requires DEQ - not the permittee - to remain the decision-maker when determining required management actions to ensure watershed wide protection of water quality and, if necessary, MPDES permit compliance. A specific permit holder should be involved as a stakeholder in this process. Similar to (3)(b), the concept described in (3)(c) seems logical assuming the DEQ is administering the Adaptive Management Program. Consideration of "all factors impacting a waterbody" is an important component of an Adaptive Management Program; however, an Adaptive Management Plan developed by a Permittee should only evaluate impacts from their discharge and identify relevant action steps to prevent and address associated water quality impairment and/or permit compliance. A MPDES permit holder is not in control of all factors that influence the watershed health outside of their discharge and its subsequent impact on water quality; and the permit holder can only be given the authority to balance those factors related to their operation, discharge water quality, and permit requirements.

RESPONSE: The department agrees that additional detail regarding the implementation of the Adaptive Management Program is necessary. Please see responses to Nos. 1 and 36. The department also agrees that the permit holder should be a stakeholder in the Adaptive Management Program and often is not in control of all factors influencing the watershed health.

COMMENT NO. 39: The science has not changed, and the state of Montana has already acknowledged nitrogen and phosphorus are both important to minimize and address nutrient pollution. DEQ's Adaptive Management Program needs to rely

on the numeric nutrient standards developed in DEQ-12A with a basis in sound science as a critical aspect of implementation of any narrative criteria. Limitation of both nitrogen and phosphorus is required to ensure our water quality is protected from nutrient loading, and to provide equivalent protection of Montana's water quality when compared to the current numeric standards.

RESPONSE: Thank you for your comment. See responses to Nos. 1 and 4.

COMMENT NO. 40: The federal Clean Water Act does not allow for prioritization of one pollutant over another, and adoption of this provision as proposed would effectively result in higher nitrogen loading from point source dischargers that are issued new MPDES permits, or within current permits where a new source or discharge is authorized. Prioritization of phosphorus is not as protective as what Montana currently has in rule for regulation of nutrients to ensure nondegradation of water quality.

RESPONSE: Water quality criteria are adopted with the goal of attaining the designated beneficial uses of state waters. Beneficial uses may be achieved using either narrative or numeric criteria. See responses to Nos. 1 and 4.

COMMENT NO. 41: Section (3)(e) of the Adaptive Management Program definition provides a good overarching goal for the program but could be improved upon by including language that specifies the restoration of impaired waterbodies to meet beneficial uses. DEQ should remain the party responsible for determining beneficial use status for a waterbody as required in the Montana Water Quality Act (75-5-702, MCA) and Section 303(d) of the federal CWA (33 USC 1251), and as defined in the 2020 "Beneficial Use Assessment Method for Montana's Surface Waters, Version 4.0," published by DEQ (Makarowski 2020).

RESPONSE: See response to No. 37. The department agrees it is responsible for determining beneficial use status for Montana waterbodies. See 75-5-301, MCA.

COMMENT NO. 42: We recommend the proposed language in New Rule I(1)(a)(ii) be revised as shown below (include underlined language, omit strikethrough language):

(A) quantify nutrient loading from both point and non-point sources to groundwater and surface water within watersheds;

(B) identify monitoring objectives that ~~evaluate impacts of nutrient on beneficial uses of surface water bodies by requiring monitoring of appropriate response variables and any associated impact thresholds;~~ and

(i) evaluate impacts from all discharges of nutrients within the watershed area of influence related to the permitted discharge point(s) on beneficial uses of surface water bodies by requiring monitoring of appropriate response variables and any associated impact thresholds;

(ii) ensure data collection locations and frequency provide sufficient data for both discharge and receiving water to evaluate for impacts related to permit compliance with statistical confidence; and

(iii) to provide sufficient physical, chemical and biological monitoring data for DEQ to determine beneficial use impairment status as defined in the most recently

published Montana Water Quality Integrated Report

(C) consider impairment status when identifying monitoring objectives to determine specific monitoring plan requirements.

RESPONSE: Thank you for your recommendations on New Rule I. Ongoing work by the department and the Nutrient Work Group may require additional edits to New Rule I as the comprehensive rule package is prepared for rulemaking later in 2022. The department will consider your recommendations as we proceed.

COMMENT NO. 43: We propose that the language in New Rule I(1)(a)(iii) and New Rule I(1)(b) through (d) be revised as shown below (include underlined language, omit strikethrough language):

(iii) ~~If an Implementation Plan is required,~~ the Implementation Plan must:

(A) ~~must~~ establish a process for identifying nutrient loading reductions and other actions needed to achieve the narrative nutrient standards and protect beneficial uses. This process will ~~prioritize phosphorus,~~ considering site specific conditions; and

(B) ~~may~~ include flexibility for point sources to identify a variety of specific actions to reduce nutrient loading within the watershed related to their discharge. These actions must be based on results from the Watershed Monitoring Plan or department assessments.

~~(b) the establishment of a process for incorporating the Watershed Monitoring Plan requirements and any Implementation Plan into MPDES permits"~~

~~(c) the establishment of a process for developing nutrient loading reductions and other actions that can be incorporated into MPDES permits as enforceable conditions; and~~

~~(d) the development of an Incentive Program to incentivize additional nutrient reductions and other actions using methods that improve water quality beyond minimum requirements.~~

(C) establish a process to prioritize and select technically and economically feasible nutrient loading reduction actions for implementation, and develop a timeline for implementation.

RESPONSE: Thank you for your recommendations on New Rule I. Ongoing work by the department and the Nutrient Work Group may require additional edits to New Rule I as the comprehensive rule package is prepared for rulemaking later in 2022. No changes will be made at this time. The department will consider your recommendations as we proceed.

COMMENT NO. 44: New Rule I (1)(a)(i) states that "Applications for MPDES Permits from these point source dischargers must include an Adaptive Management Plan. The Adaptive Management Plan must include a Watershed Monitoring Plan and may include an Implementation Plan." The Implementation Plan is a critical aspect of an Adaptive Management Plan and should be a requirement of this Plan. This language should be revised to remove the word "may."

RESPONSE: The department does not agree that an implementation plan must be developed in all cases. Cases could arise in which data from the monitoring plan indicates that waterbody beneficial uses are supported and the implementation

of additional activities to reduce nutrients is not currently necessary.

COMMENT NO. 45: Why would the Department of Environmental Quality (DEQ) allow adaptive management plans without implementation plans? Without an implementation plan, how will DEQ ensure not only corrective measures, but also proactive measures to prohibit water quality degradation?

RESPONSE: Some healthy watersheds with limited sources of regulated nutrients may not need an implementation plan initially. It is reasonable some watersheds may begin the AMP process with monitoring requirements only. See response to No. 44.

COMMENT NO. 46: The Adaptive Management Plan/Watershed Monitoring Plan must not become a mechanism for a permit holder to determine beneficial use support, or petition to change the existing beneficial use of a water body. DEQ's current process to determine beneficial use support of a water body should remain in place. Data collected within these Adaptive Management Plans can be submitted by a permit holder for DEQ to use in their determination of beneficial use support.

RESPONSE: The department agrees it is responsible for determining beneficial use status for Montana waterbodies, under 75-5-301, MCA, and acknowledges data collected within the Adaptive Management Plans may be used by the department in determining whether the beneficial uses are supported.

COMMENT NO. 47: Reliance on response variables, like chlorophyll *a* and ash free dry mass in medium-sized waterbodies, to trigger reductions in nutrient loading to a water body only after impairment has been measured is not protective of Montana's requirements for nondegradation of water quality. Reliance on response variables alone, and requiring action only after impairment thresholds are exceeded, will often result in delayed response of months to years to reduce pollution sources and restore beneficial uses.

RESPONSE: Thank you for your comment. There is ongoing work by the department and the Nutrient Work on the comprehensive rule package as the department prepares for the comprehensive rulemaking later in 2022. The department will consider your comment as we proceed. See response to No. 1.

COMMENT NO. 48: "Adaptive management program" means a watershed-scale program that protects water quality from the impacts of nutrient sources by: (3)(a) prioritizing phosphorus reduction, as appropriate, while accounting for site specific conditions. Question. Why would DEQ prioritize phosphorus alone and not phosphorus and nitrogen? The technology is available and affordable to treat phosphorus and nitrogen and these nutrients are often treated using the same treatment technology. Treatment of a single constituent of concern could result in water quality impairment and degradation.

RESPONSE: The Adaptive Management Program definition provides for phosphorus to be prioritized when appropriate for the discharge and surface water body condition and must be consistent with SB 358. Regarding nutrient treatment technology, it is generally more expensive to treat nitrogen to very low concentrations than it is to treat phosphorus to very low concentrations, and the

technologies to do so can be different. See response to No. 4.

COMMENT NO. 49: The Adaptive Management Program definition at (3)(b) states "allowing for nutrient sources to be addressed incrementally over time by incorporating flexible decision-making which can be adjusted as management actions and other factors become better understood." Question. Why is this language so passive? This seems to limit permittee liability and DEQ enforceability of corrective actions due to non-compliance. Is that the intent by DEQ?

RESPONSE: Department rules must be consistent with SB 358. See also response to No. 37. Compliance responsibility and enforcement of conditions found in MPDES permits which regulate point source discharge of pollutants to state surface waters will not be diminished or altered by this rulemaking.

COMMENT NO. 50: Regarding New Rule I(1)(a)(iii)(A) and (B), which addresses if an Implementation Plan is required. Question. Does this mean DEQ would allow equivalent nutrient reduction within a watershed for compliance as opposed to nutrient reduction at the permitted discharge location? How will DEQ incorporate this approach into a nondegradation concept? As I understand it, this means pollution could be discharged in some locations within a watershed while minimizing nutrients elsewhere. How will the bounds of this pollution trading system be defined? Will there be thresholds at point source discharges that maintain baseline water quality throughout the watershed?

RESPONSE: This proposed rulemaking includes definitions of Adaptive Management Plan and Adaptive Management Program along with some essential elements that provide context for what the department will include in a comprehensive rule package later in 2022. These framework rules were not designed to include technical and implementation details for the narrative nutrient standard or the Adaptive Management Program. The department will initiate a subsequent rulemaking later in 2022; those comprehensive rules will include details regarding monitoring plans and incorporation into Montana Pollutant Discharge Elimination System permits. See response to No. 1.

COMMENT NO. 51: Existing dischargers should be held to a reasonably achievable level of nutrient treatment technology.

RESPONSE: The department will take this comment under advisement as we proceed to the comprehensive rulemaking later in 2022. See response to No. 50.

COMMENT NO. 52: The department should apply nondegradation to protect high-quality waters consistent with the level of protection that was previously provided via numeric nutrient standards.

RESPONSE: The department must follow the requirements of 75-5-317, MCA, when addressing discharges of total phosphorus and total nitrogen in the context of nondegradation. Nondegradation objectives may be achieved using either narrative or numeric criteria.

COMMENT NO. 53: Timber harvest has always been identified as a non-point source at the state and federal level. Therefore, the Montana Department of Environmental Quality and the Environmental Protection Agency (EPA) do not have jurisdiction over timber practices in Montana. We support the proposed amendments to the definitions and the development of an adaptive management program implementing narrative nutrient standards. However, we are very concerned with bringing non-point source timber harvest activities into an Adaptive Management Plan and subsequent monitoring plan and rulemaking. We strongly urge the DEQ to strike non-point sources from the proposed rulemaking and focus on point-source dischargers.

RESPONSE: Because SB 358 requires the Adaptive Management Plan process to assess nutrients at the watershed scale, the department recognizes that non-point sources activities may be a potential contributor of nutrient loading in the watershed and finds it is appropriate to identify these activities and quantify these loads under an Adaptive Management Plan. The department does not interpret SB 358 as expanding its authority to regulate non-point sources. However, rules developed under SB 358 must reasonably balance all factors impacting a water body. Identifying non-point sources as potential partners in watersheds is critical to evaluating nutrients at a watershed scale.

COMMENT NO. 54: Regarding NEW RULE I. First, the program should follow the best available science with internal and external review and updating at set intervals. Second, every effort should be taken to ensure that the narrative standards provide the same quantification of nutrient levels as the numeric standards, even at the sacrifice of efficiency and cost. Lastly, the plan should focus on being proactive and protective rather than reactive and post-hoc; if what you're doing is responding to measured degradation you are neither protecting nor preserving water quality. NEW RULE I(1)(a)(ii)(B) should encompass a large suite of response variables as it is challenging to address effects in ecology. Each response variable could be affected by an unmeasured co-variate which clouds the analysis and management implications in a specific watershed. Incorporating a modeling approach, either statistical or process based, might be beneficial. Additionally, to reduce baseline mortality for aquatic species consider impact thresholds as chronic rather than acute. To ensure accurate assessments, require temporally and spatially extensive monitoring as dynamic conditions fluctuate and could be used to record results that favor a specific outcome.

RESPONSE: The department will carefully evaluate the usefulness of all response variables it recommends for the purpose of monitoring and evaluating the impacts of excess nutrients (eutrophication). By useful, the department means the response variable can be quantified, it can be associated with a waterbody beneficial use, and it has a threshold above which harm to the beneficial use is known or can be demonstrated. The department agrees that modeling, and in particular process-based modeling, is very useful for addressing complex water quality situations. See response to No. 2.

COMMENT NO. 55: Why would a state agency want to tie their hands in the regulation, monitoring, and enforcement of water quality standards knowing that

doing so would lead to a deterioration of that state's water quality? Why would a state agency want to move from a scientific, measurable, quantifying criteria to one of a subjective, unscientific, unqualifiable criteria?

According to the U.S. Geological Survey in a November 14, 2017 online publication:

"Nutrient pollution is one of America's most widespread, costly and challenging environmental problems."

In a similar article on EPA's webpage:

"More than 100,000 miles of rivers and streams, close to 2.5 million acres of lakes, reservoirs and ponds, and more than 800 square miles of bays and estuaries in the United States have poor water quality because of nitrogen and phosphorus pollution."

RESPONSE: See responses to Nos. 1 and 2.

COMMENT NO. 56: Nutrients (nitrogen and phosphorus) are suitable for a numerical standard as can be attested to by numerous private, tribal, independent, state, and federal laboratories and agencies.

RESPONSE: See responses to Nos. 1 and 2.

COMMENT NO. 57: Warm water has less ability to carry dissolved oxygen. Low dissolved oxygen due to excessive algae growth is one of the primary impacts of excess nutrients. As climate change warms water and shrinks flows in late summer, impacts of excess nutrients and low dissolved oxygen will be magnified. The ambiguity of narrative standards coupled with annual variations in stream flows, temperature, and precipitation will make it nearly impossible to predict damage to beneficial uses, much less prevent damage.

RESPONSE: The commenter's description of how oxygen behaves as water warms is accurate. See responses to Nos. 1, 2, and 35.

COMMENT NO. 58: Nutrient pollution is a pervasive issue throughout the United States, causing health and environmental problems that have massive economic consequences:

- 1) Human and Animal Health – direct exposure to toxic algae (HABs), nitrates in drinking water, and byproducts of water treatment, sick cattle, sick dogs, and sick people
- 2) Environmental – direct exposure to toxic algae, dead zones and hypoxia, acid rain, air pollution, agriculture and food production
- 3) Economic – drinking water, healthcare, treatment, and remediation costs, tourism and recreation industry losses, commercial fishery losses, and waterbody adjacent real estate losses.

RESPONSE: The department acknowledges that some of the detrimental effects listed in the comment are the result of excess nutrients in surface and groundwater.

COMMENT NO. 59: This new rule undermines all the time, effort, work, and funding by agencies, the public, organizations, and companies that have gone into developing and implementing Total Maximum Daily Loads for impaired waters in Montana. If the numeric nutrient standards are removed then the underpinnings of

some TMDLs, they are likewise removed rendering them inadequate for protecting and restoring our water quality, which is the whole point of TMDLs.

RESPONSE: The department disagrees with the comment. Nutrient total maximum daily loads (TMDLs) that were developed using numeric nutrient standards remain effective until revised. Revisions must be approved by EPA. Any potential future changes to water quality targets, load allocations, or wasteload allocations in approved TMDLs would need to be based on local or regional scientific analysis that would support beneficial uses.

COMMENT NO. 60: The makeup of the advisory nutrient work group lacks scientists, water quality experts, and other disinterested parties.

RESPONSE: The department disagrees with the comment. The Nutrient Work Group is a balanced advisory group that includes department scientific staff, as well as water quality professionals from industry, municipalities, and conservation organizations. Professional engineers with wastewater experience, water quality scientists, and representatives from a wide range of interests regularly attend the meetings. The structure of the Nutrient Work Group can be viewed on the department's website.

COMMENT NO. 61: The proposed definition of Adaptive Management Plan sets out to achieve narrative nutrient standards rather than numeric standards. This is a transition that the public did not ask for. Narrative standards will not protect or benefit the public or our publicly owned water resources. The DEQ should abandon this approach and return to numeric standards. The proposed rule inexplicably prioritizes the reduction of one source of nutrient pollution (phosphorus) over another (nitrogen). There is no scientific basis for this approach. It will undoubtedly result in increased degradation of waterways, while letting certain pollution sources off the hook. Although the rule aims to quantify nutrient pollution from both point sources and non-point sources, the rule lacks any regulatory tool to reduce nutrient pollution from non-point sources (such as leaky septic systems). Without any teeth, this approach will simply maintain the status quo on degraded rivers or even lead to increased nutrient pollution. As written, the rule only requires an "implementation plan" (i.e., an "action" plan) to address nutrient pollution where narrative standards are not being met and beneficial uses are not being protected. This reactive approach will do nothing to address nutrient pollution problems until it is too late.

RESPONSE: See responses to Nos. 1, 2, and 4.

COMMENT NO. 62: Numeric standards are incredibly important as a benchmark for restoration work and as a measure of health of our waterways. We are still working to improve water quality, fish population, and riparian health in numerous, if not all, waterways in Montana and including only narrative standards would make that work challenging. I am a proponent of adaptive management and application of numeric standards that are supported by data. I oppose the narrative standards that make it difficult to quantify and measure water quality impairments.

RESPONSE: Thank you for your comment. See responses to Nos. 1 and 2.

COMMENT NO. 63: In the past to address this problem, engineers told water scientists that a numeric target was needed so they could design for that. Montana's water scientists spent decades studying nutrient levels, algae levels, and other water quality measures in healthy water bodies and nutrient-impacted water bodies throughout Montana. Using this data and lab studies that related these measures to one another, the scientists developed numeric nutrient standards. These standards were reviewed and endorsed by other scientists, accepted by the EPA, and ultimately Montana's approach was seen as a model and adopted by other states grappling with nutrient pollution. Recently, the Montana Legislature proposed to reverse course. While the specifics of a new narrative rule have yet to be fleshed out, one thing is certain: without numeric targets, Montana will go back to allowing our high-quality waters to degrade until problems are obvious, and engineers will go back to guessing what might work, and trying over and over again. A better way would be to continue to use the scientific information that already has been developed for nutrient load targets for water bodies. This approach could divide water bodies into 3 groups: 1) water bodies where nutrient targets are being met and should be maintained; 2) water bodies where targets are not being met and resulting water quality problems require a management plan to reduce loads; and 3) water bodies where nutrient targets are not being met, but do not have water quality problems connected to nutrients and can simply continue to monitor for problems. Please do not move Montana's water quality backwards by adopting New Rule I, also to be known as the "I see nothing" rule. Instead, please adopt the numerical nutrient standards developed and thoroughly reviewed by Montana scientists.

RESPONSE: Thank you for your comment and recommendations on how to use existing scientific information about nutrients. The department will consider these ideas as they continue to work with the Nutrient Work Group to craft the comprehensive rules which will be proposed for rulemaking later in 2022. See responses to Nos. 1 and 2.

COMMENT NO. 64: The proposed narrative standard, which uses the presence of Chlorophyll-a as indicator of impairment, is not protective of water quality. For a rule to be protective, the threshold for corrective action must be crossed before there is biological impairment of water quality. The presence of nuisance algal growth is an indication that impairment has already occurred. Additionally, the use of Chlorophyll-a as a response variable is problematic. The Good Neighbor Agreement has conducted both biological and chemical monitoring of water quality in the East Boulder River and the Stillwater River for approximately 20 years. The monitoring data has shown that Chlorophyll-a is an unreliable indicator of nutrient levels. Its presence and growth are determined by more variables than nutrient concentrations, including water temperatures, the timing of scouring floods, and the presence of idiosyncratic conditions relative to the monitoring site. In more than 20 years of monitoring this system, a cause and effect relationship with nutrient pollution loading and Chlorophyll-a has not been established – and this data is from the upper reaches of the watershed where mine discharge is the only measurable contributor to nutrient pollution.

RESPONSE: Chlorophyll-a reflects the biomass of plant growth (mainly algal biomass in this context), and while it is true that Chlorophyll-a is influenced by other

factors in the environment it is also true that increased Chlorophyll-a is one of the first biological effects to be manifested when nutrient concentrations increase in Montana waterbodies. The department has used Chlorophyll-a for decades as a component of eutrophication assessment in streams, rivers, lakes, and reservoirs. Chlorophyll-a measurement can be used to make protective decisions about beneficial uses when it is measured often enough and the threshold for concern is established appropriately (the Clark Fork River provides a good example of this). See responses to Nos. 1, 2, and 50.

COMMENT NO. 65: The approach to implement the narrative standard is to develop an Adaptive Management Plan within a watershed. The boundaries of the watersheds themselves have yet to be determined. Will a watershed encompass more than one eco-region, will it be limited by either geographic size or the number of dischargers? The determination of the of the watershed itself will have an enormous impact on the feasibility of an AMP. The development of the AMPs is critical to the potential effectiveness of the proposed rule. DEQ must take control of the final plan.

RESPONSE: The department looks forward to additional comments on the detailed and comprehensive rule package. See responses to Nos. 1, 2, and 50.

COMMENT NO. 66: The priority given to limiting phosphorus in this rule when nitrogen is the biggest nutrient problem for most dischargers is unconscionable. For the department to allow Montana dischargers to "pass the buck" with regards to their pollutants and their impacts is irresponsible and is consequently not protective of Montana's water quality.

RESPONSE: SB 358 requires the department to prioritize the minimization of phosphorus, taking into account site-specific conditions. The type of site-specific information the department will consider includes the limiting pollutant in the receiving water and pollutants of concern in a point source dischargers waste stream. See response to No. 4.

COMMENT NO. 67: If the numeric nutrient standards are removed, then the underpinnings of some TMDLs are likewise removed, rendering them inadequate for protecting and restoring our water quality, which is the whole point of TMDLs. (FWS)

RESPONSE: See response to No. 59.

COMMENT NO. 68: EPA regulations specify that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). Because water quality criteria must be set at a level that protect the designated uses, a scientific determination, economic factors "are irrelevant" and states should not take them into account. *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980).

RESPONSE: Water quality criteria are adopted with the goal of attaining the designated beneficial uses of state waters. Beneficial uses may be achieved using either narrative or numeric criteria. See responses to Nos. 1 and 2.

COMMENT NO. 69: We are greatly concerned that DEQ is actually carrying forward the proposed "adaptive management program." In our experience this phrase signals an open-ended and purposefully ambiguous regulatory scheme that benefits the regulated community and externalizes the costs of major polluting sectors on the human environment. The proposed rule language, without necessary details, tells no different story.

RESPONSE: See responses to Nos. 1, 2, and 50.

COMMENT NO. 70: Creation and/or use of novel response variables under a purely narrative nutrient standard throws out the state's existing, proactive approach to nutrient pollution control in favor of a crisis management regime where attempts to address site-specific pollution problems occur only after excessive nutrient pollution has degraded a waterbody and imperiled attainment of its designated uses. This makes little scientific or economic sense as it is far more efficient - and cheaper - to prevent nutrient pollution problems than to try and fix them after they occur.

RESPONSE: See responses to Nos. 2, 5, and 50.

COMMENT NO. 71: "Incrementalism" is a hallmark of SB 358 and New Rule I, yet it is a temporal concept completely absent from requirements of the CWA or MWQA. Point source nutrient discharges must obtain an MPDES permit which, among other items, must contain effluent limits, effective at the time of discharge, to ensure the discharge does not cause or contribute to violations of water quality standards. Compliance must be determined at the time of permitting, not at some future date. To the extent that a point source requires more time to comply with effluent limits, DEQ has the authority to impose a compliance plan.

RESPONSE: The department acknowledges that there are existing regulatory tools, such as compliance schedules and variances, that may be used to allow a permittee to comply with a permit limit over a defined period. The department will avail itself of these tools on a case-by-case basis, as appropriate, in MPDES permits. Adaptive management rules must also be consistent with SB 358.

COMMENT NO. 72: We oppose ARM 17.30.1304(3)(c) through (e) as contrary to requirements of the CWA and MWQA and lacking a proven scientific basis. Subjective assessments of "reasonableness" or "feasibility" and the interjection of new cost-benefit analyses on the basis of to-be-determined metrics do not satisfy requirements for MPDES permitting or the use of existing water quality data supporting existing pollution control requirements.

RESPONSE: See responses to Nos. 1, 2, 37, and 68.

COMMENT NO. 73: We oppose New Rule I(1)(a)(i), requiring an AMP for every MPDES permit and, presumably, supplanting existing effluent limits. We also specifically object to DEQ requiring a monitoring - but not necessarily an implementation - plan. We also object to the discretion afforded DEQ in determining, on any apparent basis, whether an implementation plan will be required. Language purporting to describe an implementation plan lacks clarity or any connection to MPDES permitting rules or requirements of the TMDL program, such as means for incorporating wasteload allocations into permit effluent limits.

RESPONSE: The department disagrees with the interpretation of New Rule I. Adaptive management plans are not required if another compliance tool is appropriate. Existing effluent limits are subject to antibacksliding requirements unless an exception exists. Implementation plans may not be appropriate in all circumstances. See responses to Nos. 1, 44, 50, and 71.

COMMENT NO. 74: We oppose affording a permittee discretion in selecting how or where they may hypothetically work on nutrient pollution in a watershed. DEQ must oversee and make final decisions on pollution control limits and afford meaningful opportunities for public participation and review as required by law.

RESPONSE: Final permit decisions are made by the department. The department will continue to provide opportunities for public participation as required by state and federal law. See responses to Nos. 1 and 2.

COMMENT NO. 75: First, sanctioning an Adaptive Management Plan that allows a point source to do less pollution control at its point of discharge in return for theoretical pollution reductions elsewhere is likely to incite local "hot spot" pollution effects on receiving waters. The Adaptive Management Plan concept of allowing watershed scale "offsets" as proposed is contrary to EPA's rules at 40 CFR 122.44(d), the intent of the MWQA and CWA in protecting "chemical, physical, and biological integrity," Montana citizens' rights to prevent unreasonable depletion of our environment, and DEQ's duties to be preventative in managing water pollution control programs.

RESPONSE: Water quality criteria are adopted with the goal of attaining the designated beneficial uses of state waters. Beneficial uses may be achieved using either narrative or numeric criteria. 40 CFR § 122.44(d) is adopted by reference in state rules at ARM 17.30.1344 and provides several mechanisms to establish effluent limits using narrative criteria. To the extent the commenter seeks to invoke Montana's constitutional protections, an agency cannot resolve constitutional issues. Constitutional questions are properly decided by a judicial body under the constitutional principle of separation of powers. See responses to Nos. 1 and 50.

COMMENT NO. 76: We are also concerned by and oppose the concept of new pollution discharges being able to use an Adaptive Management Plan, and the use of Adaptive Management Plans within impaired waters in manners that would violate the prohibition of new discharges of pollutants of concern into impaired waters lacking a TMDL pursuant to *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007).

RESPONSE: It is unlawful to cause pollution of any state waters. See 75-5-605, MCA. Permit applications are evaluated on a case-by-case basis to ensure they comply with all legal requirements.

COMMENT NO. 77: Regarding Montana's Department of Environmental Quality (DEQ)'s amendment of ARM 17.30.1304 and the adoption of New Rule I pertaining to definitions and the development process for the adaptive management program (AMP) to implement narrative nutrient standards as described in Senate Bill 358, the United States Environmental Protection Agency (EPA) will review any final

rules developed through this process and determine whether they constitute new or revised WQS that EPA would either approve or disapprove, pursuant to CWA 303(c) and 40 C.F.R. Part 131. As DEQ works with the nutrient work group to develop comprehensive rule language, EPA reiterates its recommendation that DEQ consider EPA's written comments submitted on August 18, 2021 (Montana's proposed response variables and associated thresholds) and October 26, 2021 (EPA's comments on the draft rule package for Senate Bill 358).

RESPONSE: The department thanks EPA for the comment and the commitment to provide additional comments on the comprehensive rule package anticipated later in 2022.

COMMENT NO. 78: I am concerned that this law will put Montana out of compliance with our 401 certification and may result in more regulatory (federal) involvement rather than less.

RESPONSE: 401 certification is outside of the scope of this rulemaking. See response to No. 1.

COMMENT NO. 79: This legislatively mandated action is illegal according to the Memorandum of Agreement that the state of Montana entered into in 1981 when it petitioned EPA to allow DEQ the ability to implement provisions of the Clean Water Act. The fact that the state's Attorney General failed or intentionally did not reference this MOA to the legislature is also in violation of an MOA the state Attorney General was required to sign regarding the Clean Water Act.

RESPONSE: It is not clear what memorandum the commenter is referencing. Montana entered into a Memorandum of Agreement with EPA in 1974 to operate a discharge permitting program for federal Clean Water Act purposes. See 39 Fed. Reg. 26061 (July 16, 1974). The department disagrees this rulemaking is inconsistent with the 1974 Memorandum of Agreement. See responses to Nos. 1, 2, and 50.

COMMENT NO. 80: The burden for the process of designating outstanding natural resource waters (ONRWs), per 75-5-316, MCA, has fallen to the public. But without first determining which stretches of river should be designated as ONRWs, the department, under this new law, has various methods to authorize degradation of state waters.

RESPONSE: Thank you for the comment. However, designation of outstanding natural resource waters is outside the scope of the rulemaking.

COMMENT NO. 81: The department received multiple comments regarding Montana's constitutional requirement for a clean and healthful environment and that, in effect, SB 358 and New Rule I violate this requirement.

RESPONSE: An agency cannot resolve constitutional issues. Constitutional questions are properly decided by a judicial body under the constitutional principle of separation of powers.

COMMENT NO. 82: SB 358 has significant constitutional implications. Specifically, under Article II, section 3, Montanans have a fundamental, inalienable

constitutional right "to a clean and healthful environment" and the right to seek "their safety, health, and happiness in all lawful ways." In addition to these protections, Article II, section 3 rights, the Constitution goes even further. Article IX, section 1 mandates that "[t]he state and each person *shall maintain and improve* a clean and healthful environment for present and future generations." Sections (2) and (3) of this Article then go on to require the legislature to provide administration, enforcement and adequate remedies for its section (1) duty and to protect the environmental life support system *from degradation and unreasonable depletion*. *SB 358 is not designed to maintain and improve* a clean and healthful environment or protect water quality from degradation. Indeed, SB 358 was crafted to allow precisely the opposite. Clean water is just too demanding and expensive to maintain, much less improve. By any standard, SB 358 violates the Montana Constitution and is therefore illegal. The DEQ's proposed amendment and new rule should not be adopted. No industry has the right to pollute and degrade Montana's water because it is too hard or expensive. If these industries cannot protect our waterways then they should get out of business.

RESPONSE: Discharge permits are issued in compliance with the Montana Water Quality Act. See response to No. 81.

COMMENT NO. 83: The intent of SB 358 is to prohibit the department from using numeric concentrations of total nitrogen and total phosphorus for limiting discharges. Numeric concentrations of receiving water cannot be used to limit discharges, only narrative "response variables" and "impact thresholds" can be used to limit discharges. No numbers for nutrients are allowed. The intent and letter of SB 358 are truly extreme and New Rule I needs to address those obligations.

RESPONSE: SB 358 required the deletion of numeric nutrient standards found in Department Circular DEQ-12A. SB 358 does not preclude the department from including numeric limits for phosphorus, nitrogen, or both in MPDES permits to properly implement narrative nutrient standards.

COMMENT NO. 84: The process the legislature and the department are undertaking (via New Rule I) do not meet NEPA requirements under the Clean Water Act and other federal laws.

RESPONSE: This is a state rulemaking, conducted under Title 2, chapter 4, part 3, MCA. Requirements of the National Environmental Policy Act, or NEPA, are outside the scope of this rulemaking process.

COMMENT NO. 85: In 1999, the Montana Supreme Court ruled unanimously that Montanans' constitutional right to a clean and healthful environment (Article IX, Section 1) is a fundamental right. Justice Triewelier held that: "*Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked,*" and concluded that "*the delegates' intention was to provide language and protections which are both anticipatory and preventative,*" establishing that the right is preventative in nature. This comment letter includes photos of harmful algae blooms and excessive algae growth across Montana.

RESPONSE: An agency cannot resolve constitutional issues. Constitutional

questions are properly decided by a judicial body under the constitutional principle of separation of powers.

COMMENT NO. 86: I propose that the new rules and associated adaptive management plans incorporate specific nondegradation requirements consistent with the intent of ARM 17.30.715(1)(f). The existing science for the previous numeric nutrient standards can provide a starting point for TP and TN narrative translation values

RESPONSE: Thank you for your comment pertaining to nondegradation. The department must follow the requirements of 75-5-317(2)(u), MCA, when addressing discharges of total phosphorus and total nitrogen in the context of nondegradation. This statute was amended by enactment of SB 358. See response to No. 1.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

BY: /s/ Edward Hayes  
EDWARD HAYES  
Rule Reviewer

BY: /s/ Christopher Dorrington  
CHRISTOPHER DORRINGTON  
Director

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.11.206, 24.11.450A, and )  
24.11.452A pertaining to response )  
times in unemployment insurance )

TO: All Concerned Persons

1. On January 28, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-11-383 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 145 of the 2022 Montana Administrative Register, Issue Number 2.
2. The department held a public hearing in Helena on February 25, 2022, over the Zoom videoconference and telephonic platform at which no members of the public commented. No written comments were received during the public comment period.
3. The department has amended ARM 24.11.206, 24.11.450A, and 24.11.452A as proposed.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.17.127 concerning prevailing )  
wages )

TO: All Concerned Persons

1. On January 28, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-17-389 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 149 of the 2022 Montana Administrative Register, Issue Number 2.

2. The department held a public hearing in Helena on February 25, 2022, over the Zoom videoconference and telephonic platform at which a member of the public commented. No written comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT 1: A commenter spoke in favor of the amendment.

RESPONSE 1: The department acknowledges the comment.

4. The department has amended ARM 24.17.127 as proposed.

/s/ QUINLAN L. O'CONNOR  
Quinlan L. O'Connor  
Alternate Rule Reviewer

/s/ LAURIE ESAU  
Laurie Esau, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 1, 2022.

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES OF THE  
STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF DECISION ON
Rules I through IX and the	)	PROPOSED ADOPTION AND
amendment of ARM 37.106.2802,	)	AMENDMENT
37.106.2803, 37.106.2804,	)	
37.106.2805, 37.106.2809,	)	
37.106.2814, 37.106.2815,	)	
37.106.2816, 37.106.2817,	)	
37.106.2821, 37.106.2822,	)	
37.106.2823, 37.106.2824,	)	
37.106.2829, 37.106.2835,	)	
37.106.2836, 37.106.2838,	)	
37.106.2847, 37.106.2849,	)	
37.106.2854, 37.106.2855,	)	
37.106.2860, 37.106.2866,	)	
37.106.2875, 37.106.2885,	)	
37.106.2886, 37.106.2896, and	)	
37.106.2904 pertaining to assisted	)	
living rules related to background	)	
checks and category D endorsement	)	

TO: All Concerned Persons

1. On December 10, 2021, the Department of Public Health and Human Services published MAR Notice No. 37-909 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1736 of the 2021 Montana Administrative Register, Issue Number 23.

2. A public hearing on the notice of proposed adoption and amendment of the above-stated rules was held on December 30, 2021.

3. After the public hearing, various changes were made to the proposed and amended rules. It was determined that for clarity and readability a new MAR notice would be prepared that included all the official text of the rules as well as the revisions. The department expects this action to promote a better understanding of the rules. The new MAR notice will be filed as soon as possible.

/s/ Flint Murfitt  
Flint Murfitt  
Rule Reviewer

/s/ Adam Meier  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State March 1, 2022.

## **NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

### **Interim Committees and the Environmental Quality Council**

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

#### **Economic Affairs Interim Committee:**

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

#### **Education and Local Government Interim Committee:**

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

#### **Children, Families, Health, and Human Services Interim Committee:**

- Department of Public Health and Human Services.

#### **Law and Justice Interim Committee:**

- Department of Corrections; and
- Department of Justice.

#### **Energy and Telecommunications Interim Committee:**

- Department of Public Service Regulation.

**Revenue and Transportation Interim Committee:**

- Department of Revenue; and
- Department of Transportation.

**State Administration and Veterans' Affairs Interim Committee:**

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

**Environmental Quality Council:**

- Department of Environmental Quality;
- Department of Fish, Wildlife and Parks; and
- Department of Natural Resources and Conservation.

**Water Policy Interim Committee (where the primary concern is the quality or quantity of water):**

- Department of Environmental Quality;
- Department of Fish, Wildlife and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

## HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: **Administrative Rules of Montana (ARM)** is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

**Montana Administrative Register (MAR or Register)** is an online publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding Register.

### Use of the Administrative Rules of Montana (ARM):

- |                  |  |
|------------------|--|
| Known<br>Subject | 1. Consult ARM Topical Index.<br>Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued. |
| Statute          | 2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.                |

## RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 2021. This table includes notices in which those rules adopted during the period September 24, 2021, through February 25, 2022, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 2021, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2021 or 2022 Montana Administrative Registers.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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**CHRISTI JACOBSEN**  
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